UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ARIEL HERNANDEZ,

Plaintiff,

v

COPPER MOUNTAIN NETWORKS, INC, et al,

Defendants.

_____

AND RELATED MATTERS

_____/

No C-00-3894 VRW

ORDER

No C-00-3944 VRW
No C-00-3987 VRW
No C-00-3998 VRW
No C-00-4017 VRW
No C-00-4045 VRW
No C-00-4062 VRW
No C-00-4093 VRW
No C-00-4115 VRW
No C-00-4127 VRW
No C-00-4171 VRW
No C-00-4172 VRW
No C-00-4255 VRW
No C-00-4281 VRW
No C-00-4282 VRW
No C-00-4299 VRW
No C-00-4314 VRW
No C-00-4364 VRW
No C-00-4436 VRW
No C-00-4474 VRW
No C-00-4640 VRW
No C-01-0019 VRW
No C-01-0082 VRW

The court will conduct a case management conference in these related actions on March 8, 2001, at 10:00 am. Counsel should be prepared to discuss issues raised by the pending motion to consolidate these actions, the motions to designate lead plaintiff and lead counsel and matters herein.

I

In advance of selecting a lead plaintiff, the court must address the motion to consolidate filed by the "Copper Mountain Investors." Doc #20. See 15 USC § 78u-4(a)(3)(B)(ii). Twenty-three separate actions have been filed to date. Upon a preliminary review of the complaints in these actions, common questions of law and fact appear to exist. FRCP 42(a). All plaintiffs appear to allege essentially the same class period: April 19, 2000, through October 17, 2000. A few complaints state that the class period begins on April 18, 2000. The actions also appear to name the same three defendants: Copper Mountain Networks, Inc; Richard Gilbert and John Creelman. If counsel for any plaintiff possesses information relevant to the determination whether to consolidate that is not already presented in the motion, they are directed to provide such information at the conference.

II

Turning to the selection of lead plaintiff, the court recognizes that the Private Securities Litigation Reform Act (PSLRA), 15 USC § 78u-4, et seq, creates a rebuttable presumption that the named plaintiff with the largest financial interest in the action should be the lead plaintiff. 15 USC § 78u-4(a)(3)(B)(iii) (I)(bb). Congress created this presumption in order to increase the likelihood that institutional investors would serve as lead plaintiffs. House Conference Report No 104-369, 104th Cong 1st Sess at 34 (1995); see also Gluck v CellStar Corp, 976 F Supp 542, 548 (ND Tex 1997). No institutional investors are involved in the present actions.

In determining which proposed lead plaintiff has the largest financial stake, the court looks to individual plaintiffs, not an aggregation or group of plaintiffs. Except in two narrow circumstances, this court has rejected aggregation as a means of fulfilling the "largest financial interest" condition for the presumption under section 78u-4(a)(3)(B)(iii)(I)(bb). Wenderhold v Cylink Corp, 188 FRD 577, 586 (ND Cal 1999). Other courts have likewise rejected aggregation. See, e g, In re Network Associates, Inc Sec Lit, 76 F Supp 2d 1017, 1021-27 (ND Cal 1999); In re Telxon Corp Sec Lit, 67 F Supp 2d 803, 809-13 (ND Ohio 1999); Aronson v McKesson HBOC, Inc, 79 F Supp 2d 1146, 1153-54 (ND Cal 1999); In Re Donnkenny Inc Sec Lit, 171 FRD 156, 157 (SD NY 1997) ("To allow an aggregation of

unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff."). Aggregation may be appropriate, but only under two circumstances: (1) if intra-class periods make it impossible for a single plaintiff to represent the class adequately or (2) if the group of investors, functioning as a group, is more capable than any single plaintiff at exercising effective control over the litigation consistent with the goals of the PSLRA. Wenderhold, 188 FRD at 586. If any of the proposed lead plaintiffs have grounds to establish that aggregation is appropriate in these circumstances, they should be prepared to demonstrate those grounds at the March 8 conference.

Notwithstanding the rebuttable presumption enacted by the PSLRA, the court retains an obligation to choose the most adequate representative for the class. 15 USC § 78u-4(a)(3)(B)(I). A named plaintiff enjoys no entitlement to lead plaintiff designation simply because that plaintiff's loss exceeds the loss for any other plaintiff that has come forward. In this regard, the court emphasizes that the PSLRA specifies a particular means for potential lead plaintiffs to demonstrate that they can discharge such obligations in the context of securities class actions, but the responsibilities for lead plaintiffs are grounded in FRCP 23. In all class actions, the class representative is a fiduciary for absent class members. Cohen v Beneficial Indus Loan Corp, 337 US 541, 549 (1949). An adequate representative plaintiff is one that is willing and able to satisfy the fiduciary obligations that attend lead plaintiff status, namely, the capability of "adequately representing the interests of class members * * * ." Id.

Absent class members, no less than any other consumer of legal services, are presumably interested in the quality and cost of counsel for the class. One of the primary fiduciary obligations of the lead plaintiff, therefore, is to act responsibly in obtaining competent counsel and negotiating an appropriate fee arrangement. A proposed lead plaintiff can best demonstrate the willingness and ability to discharge the fiduciary duties of the lead plaintiff by demonstrating the willingness and ability to take charge of the litigation and negotiate a reasonable representation arrangement with class counsel. If a proposed lead plaintiff cannot fulfill this obligation, it is difficult to imagine that such plaintiff can adequately protect the class in the ensuing litigation.

Accordingly, given the absence of an institutional investor plaintiff or one with a uniquely large financial interest, the court concludes that receiving certain information from each of the individual

plaintiffs who have applied (individually or as part of a group) to be lead plaintiff will assist the court in determining whether any of them are capable of "fairly and adequately protecting the interests of the class." 15 USC § 78u-4(a)(3)(B)(iii)(II)(aa). Each of the individual plaintiffs who have applied to be lead plaintiff are thus directed to respond to the following inquiries by serving and filing a declaration under penalty of perjury no later than February 16, 2001:

1. Did you investigate the legal or factual basis of the claims asserted in your complaint or did you rely solely on counsel to do this?
2. Did you seek out counsel or did counsel or someone else seek out you to serve as representative plaintiff?
3. Did you contact any lawyers other than your present counsel about this action and, if so, whom did you contact and when did you do so?
4. What did you do to negotiate a fee and expense reimbursement arrangement that promotes the best interests of the class?
5. What arrangements do you have with proposed class counsel concerning their fees and expenses?
6. What benchmarks do you have in place to measure class counsel's performance during the progress of the litigation?
7. How do you plan to monitor class counsel's conduct of the litigation?
8. Do you have any prior business, professional, family or other relationships with proposed class counsel and, if so, what are those relationships?
9. What prompted you to purchase or sell the securities at issue here on the dates on, and at the prices at, which those transactions were made?
10. Did you make inquiry or do you know whether any intermediaries through whom you made your transactions in the securities at issue have any business, professional, family or other relationships with proposed class counsel?

The court may seek additional information based on responses to the foregoing.

III

If, after reviewing the submitted declarations, the court determines that no proposed lead plaintiff has effectively negotiated with counsel, the court may request the prospective lead plaintiffs to engage in such negotiations. In the end, however, under the PSLRA, the selection of lead counsel is "subject to the approval of the court." 15 USC § 78u-4(a)(3)(B)(v). This statutory delegation, along with "the court's fiduciary obligation to the plaintiff class," In re Wells Fargo Sec Lit, 157 FRD 467, 468 (ND Cal 1994), requires the court to ensure that qualified, competitively-priced counsel is selected. Thus, if the court determines that no prospective lead plaintiff has the ability to negotiate with counsel on behalf of the class, the court must itself intervene to ensure that the interests of the class are protected. See Wenderhold, 188 FRD at 587.

If the court determines that intervention is necessary to protect the interests of the class in this case, the court is considering appointing a special master, pursuant to FRCP 53, to assist the lead plaintiff with that process. The court has in the past overseen the selection of counsel directly. See In re Oracle Sec Lit, 132 FRD 538 (ND Cal 1990); 136 FRD 639 (ND Cal 1991); In re Wells Fargo, 157 FRD 467; Wenderhold, 188 FRD 577. While that approach yielded notable advantages for the class in those cases, the court recognizes the possibility (and, perhaps more importantly, the possible appearance) of the court prejudging the merits of the case, because consideration of a fee arrangement necessarily entails conjecture about the likelihood of success of a case, the likelihood of settlement and the possible timing of settlement. See Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 FRD 237, 256 (1985). This places the court in the anomalous position of having to speculate about its own future decisions. Appointment of a special master to assist in the selection of counsel may obviate this problem.

The special master would be expected to attempt to choose counsel in a way that emulates the choice that market forces would dictate if lead plaintiff were able effectively to negotiate with prospective counsel. See Declaration of Joseph Grundfest in Aronson v McKesson HBOC, Inc, No C-99-20743-RMW (ND Cal 1999) (Grundfest Decl), at ¶ 21 ("Experience establishes that the most effective way to achieve the goal of retaining the highest quality representation at the lowest price is to invoke marketplace competition among interested, qualified attorneys at the outset of the litigation * * * ."); In re

Wells Fargo, 157 FRD at 468 ("In performing this analysis, the court must strive to emulate the arrangements and decisions that the class itself would make were it able to negotiate."). Invoking the market to select counsel will likely lead to greater net recovery by the class. See Grundfest Decl ¶21-24.

Payment of the special master is a practical concern. The court believes that if a special master is used the firm eventually chosen to represent the class should pay the fees incurred by the special master. Thus, the court will require any firm seeking to be named lead counsel to agree to pay the special master's fee at the end of the selection process if that firm is chosen to be lead counsel. Before submitting a bid, each firm would be required to submit a letter of credit evidencing its ability to pay the special master's fees and expenses.

The court invites counsel to respond to this proposed procedure. Counsel may submit, no later than February 16, 2001, a

//

//

//

memorandum of up to 15 pages along with the declarations requested in Part II.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Judge